Keeping the Outliers in Line? Judicial Review of State Laws by the U.S. Supreme Court*

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Objective. Proponents of the "regime politics" approach argue that the U.S. Supreme Court tends to promote the interests of the dominant partisan coalition even while engaging in seemingly countermajoritarian behavior. These scholars suggest that the Court's invalidation of state laws is used to enforce a national consensus against outlier states. We argue this claim does not withstand empirical analysis. *Method.* We employ logistic regression analysis to evaluate the relationship between the invalidation of state laws by the Court and the ideological distance between the sitting national government and the state government that enacted the law. *Results.* Our analysis fails to find support for the regime enforcement hypothesis; in fact, we find evidence of a negative relationship between ideological distance and invalidation. *Conclusions.* Our findings suggest that regime politics scholars have underestimated the Court's countermajoritarian role in reviewing state legislation.

For the last half-century, normative debates over judicial review have focused on Alexander Bickel's "countermajoritarian difficulty" ([1962] 1986). Bickel suggested that judicial review was a "deviant institution in the American democracy" because "when the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now" ([1962] 1986: 16–20). This normative dilemma has attracted so much attention from constitutional theorists that some have described it as an "obsession" of the legal academy (Friedman, 1993:578; Keck, 2007b:513). Yet, despite this persistent interest, empirical studies consistently find that the "difficulty" is moot because the courts generally serve the interests of the dominant governing coalition. Advocates of this "regime politics" approach claim the U.S. Supreme Court tends to promote the interests of the dominant coalition, even when issuing rulings that invalidate democratically enacted statutes.

Regime politics scholars tend to focus on invalidations of federal law because they pose the most obvious countermajoritarian difficulty, but invalidations of

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state laws are far more common and often highly contentious (e.g., *Brown v. Board of Education* and *Roe v. Wade*). These invalidations could also potentially undermine the interests of the regime, especially if the regime's priorities relate to subjects traditionally controlled by state governments, such as crime, gun control, education, welfare, or family law. Nonetheless, regime politics scholars usually dismiss this possibility. Instead, they claim the Court uses judicial review of state laws to enforce a national consensus against outlier states (Clayton and Pickernill, 2006:1393; Dahl, 1957:282; Graber, 1993:39). Under this theory, even frequent invalidations of state laws could be consistent with regime politics. Although many studies present persuasive historical interpretive accounts of such behavior by the Court, no study has conducted a systematic empirical examination of whether the Court tends to invalidate laws enacted by ideological outliers.

Contrary to the regime politics approach, there are many reasons to suspect the Court actually tends to invalidate laws enacted by mainstream states rather than policy outliers. For example, the justices may strategically target laws enacted by mainstream states in order to maximize their effect on policy. If so, the regime politics literature may have this relationship backward: the Court may actually be less likely to invalidate laws enacted by outlier states.

We evaluate the relationship between the invalidation of state laws by the U.S. Supreme Court and the degree to which the enacting state is an ideological outlier from the national regime. We do so by assessing the relationship between invalidations of state laws and the ideological distance between the state government that enacted the law and the national regime at the time of the potential invalidation. In order to avoid possible selection bias, we adopt a statute-centered, rather than a case-centered, analysis. Our sample includes all statutes enacted by every state between 1960 and 2006. We fail to recover evidence that the Court acts as an agent for the regime by invalidating ideologically distant state laws. In fact, the Court appears to be *more* likely to invalidate laws from states that are ideologically proximate to the national regime.

Our study sheds new light on judicial review of state laws in American politics, and our findings have broad implications for empirical and normative debates related to judicial behavior, federalism, constitutionalism, and democratic theory. First, our findings suggest the Court may frequently be unconstrained by the elected branches when reviewing state laws, or at least less constrained than some have suggested. Second, contrary to the claims of many scholars, we find that invalidations of state laws are not primarily used to help elected officials overcome the federal structure by imposing a national consensus on outlier states. Accordingly, the federal structure may indeed promote local independence and policy variation to a greater degree than these scholars suggest. Finally, our failure to confirm the basic expectations of the regime politics literature suggests that judicial review of state laws may indeed pose a serious "countermajoritarian difficulty" in the American political system.

In what follows, we begin by considering the literature on "regime politics" and that literature's expectations regarding judicial review of state laws by the U.S. Supreme Court. Next, we describe matters of data, methodology, and results. Finally, we conclude with a discussion of judicial review of state laws and the broader implications of our research.

The Regime Politics Approach

The modern regime politics literature is an outgrowth of Robert Dahl's seminal work. Dahl argued that, "[e]xcept for short-lived transitional periods . . . the Supreme Court is inevitably a part of the dominant national alliance" (1957:293). As such, "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States," and the Court should not be expected to "long hold to norms of Right and Justice substantially at odds with the rest of the political elite" (1957:285, 291). Dahl's argument directly contradicts the traditional, countermajoritarian view of the Court. Rather than an independent umpire protecting minorities and ensuring liberty, Dahl suggests the Court is essentially an ally of the dominant political regime. The "neo-Dahlian" literature has expanded on this basic concept by explicating why and how the Court tends to promote regime interests.

This literature highlights three institutional factors that might lead the Court to promote regime interests. First, due to the appointment process, members of the federal judiciary tend to share the ideology of the governing coalition (Moraski and Shipan, 1999; Peretti, 1999:119; Stimson, Machuen, and Erikson, 1995). Accordingly, judges may tend to promote regime interests as they pursue their own policy preferences. Second, when judges disagree with the regime, a fear of sanctions from the elected branches might constrain their choices (Clark, 2009; Epstein and Knight, 1998:142–43; Lindquist and Solberg, 2007; Harvey and Friedman, 2003, 2006, 2009). And third, if the justices do defy the regime, elected officials can simply refuse to implement their rulings because the Court lacks implementation powers (Epstein and Knight, 1998:144; Rosenberg, 2008:420; Scheingold, 1974:117; Vanberg, 2001).

As a result of these factors, the Court supposedly promotes regime interests in several ways. The Court can lend legitimacy to the regime by upholding laws (Dahl, 1957:294; Murphy, 1964:17; Whittington, 2007:152–57) or by making "decisions that are deemed unworthy of legislative attention" through statutory interpretation, thereby freeing elected officials to handle issues that win them "political plaudits" (Whittington, 2007:121). The Court might also help public officials avoid blame (Lovell, 2003:42–67; Murphy, 1964:17; Whittington, 2005:592, 2007:136–37) or invalidate the work of ideologically distant coalitions (Dahl, 1957:293; Gates, 1991; Gillman, 2002; Ginsberg, 2003; Whittington, 2005:583–91, 2007:124–34).

Lastly, the Court justices might assist "national officials by imposing their shared constitutional agenda on recalcitrant state actors who hamper national policy goals" (Whittington, 2005:586). The Court's role as monitor of outlier states is the focus of this study. Many scholars claim the fragmented nature of the American federal structure "allows members of the out-party to consolidate and exercise governmental power over limited jurisdictions"; judicial review of state laws is "the primary mechanism available to the federal government for supervising the independent state governments" (Whittington, 2007:105). By "extending the policy preferences of elected national elites to local outliers" (Clayton and Pickernill, 2006:1393), the Court "protects the rights of national majorities against local interests" (Graber, 1993:39).

Regime politics scholars offer numerous examples of the Court behaving in this manner. For example, Graber suggests that "the Taft Court struck down state laws inconsistent with the probusiness, laissez-faire policies of the Harding/Coolidge administration," and that the Rehnquist Court was "hostile to local affirmative action policies" (1993:39). Klarman offers *Griswold v. Connecticut* and *Gideon v. Wainwright* as examples of the Court "seizing on a dominant national consensus and imposing it on local outliers" (1996:16). Similarly, Whittington describes the *Lochner* Court as using "the 'dormant' commerce clause to keep states in line with 'matters of national concern'," and the Warren Court as "centrally concerned with enforcing the evolving constitutional understandings of the 'Democratic political order' against resistant states" (2007:111–20). Of course, these scholars do not suggest that the Court invalidates every state policy that conflicts with regime preferences or that all invalidations of state law follow this pattern. However, implicit in their argument is the belief that judicial review of state laws is primarily employed to promote the regime and, thus, does not usually thwart majority will. Many scholars rely on this description of the Court's behavior to reconcile judicial review of state laws with the regime politics perspective (e.g., Gillman, 2003:252; Graber, 2003; Powe, 2000:489–92; Rosen, 2006:4), and yet, to date, no study has systematically tested this empirical claim.

Despite the compelling work by regime politics scholars, others question the basic claims of this approach (Hall, 2012; Keck, 2007b). For example, some scholars argue that presidents and senators sometimes base their appointment decisions on nonideological factors, such as competency, qualifications, and interest group support (Guliuzza, Reagan, and Barrett, 1994; Segal, Cameron, and Cover, 1992; Caldeira and Wright, 1988). Once on the Court, justices may not reflect the ideology of the officials who appointed them (Segal, Timpone, and Howard, 2000; Epstein et al., 2007b), and even if they do, preferences on the Court might be distributed differently than in the elected branches (Graber, 2006; Keck, 2007b: 532). Additionally, the Court may have little fear of sanctions from Congress (Owens, 2010; Sala and Spriggs, 2004) and ample power to implement even unpopular decisions under the right circumstances (Hall, 2011; Keck, 2009; McCann, 1994). If these counterarguments are accurate, the Court may be more independent than regime politics scholars

suggest. If so, the Court may use invalidations of state law to promote its own ideological preferences or legal values, rather than merely enforcing national interests against outlier states. In this study, we evaluate the Court's use of judicial review of state laws. Does the Court tend to invalidate laws enacted by outlier states?

Design, Data, and Measurement

We evaluate whether the Court tends to use judicial review of state laws to enforce a national consensus against outlier states. If so, the Court should tend to invalidate laws enacted by state governments that are ideologically distant from the national governing regime. We begin by considering the laws passed by each state from 1960 through 2004, which we consider as eligible to be struck down by the Court from 1960 through 2006.[1] Our data, for example, include one observation for laws enacted in the state of Minnesota in 1960 that were eligible to be struck down by the Court that same year. We then have additional observations for those same 1960 Minnesota laws that could have been struck down in 1961, 1962, . . . , all the way through 2006. Repeating this same procedure for all states yields a total of 47,956 observations.[2] We adopt this aggregate approach for both methodological and pragmatic reasons. First, by eschewing a case-centered approach we avoid a basic—yet surprisingly pervasive—methodological limitation in the study of Supreme Court decision making: the failure to account for possible strategic action by litigants in their decision to seek the Court's review of their case (Harvey and Friedman, 2006; Songer, Cameron, and Segal, 1995). By focusing on only those cases that were decided by the Supreme Court or only those cases that were appealed to the Court, such case-level approaches create the possibility of selection bias. Litigants may refrain from appealing a case if they anticipate losing an appeal (McGuire et al., 2005), and the Court may refrain from agreeing to hear a case if it anticipates its own deferential response (Cross and Nelson, 2001:1476; Epstein and Knight, 1998:84). Our design avoids this potential problem.[3]

Our analysis pools together all statutes enacted in a single state in a single year, rather than treating each statute as a separate observation. We adopt this state-level analysis due to data limitations. Currently, no data set exists of every state law enacted during this time period. More importantly, were we to create such a data set, we would still be unable to account for individual statute variation because this strategy would require placing each of these laws

[1]Estimates of state ideology (Berry et al., 1998, 2010) do not exist prior to 1960, which is why we cannot examine statutes passed prior to 1960.

[2]Note that our data set excludes years in which a particular state did not pass any laws, since the Court cannot invalidate something that does not exist.

[3]There are practical limitations to the case-based approach, as well. For example, data on the Court's agenda-setting decision are only available for the relatively brief time period of 1986–1994 (Epstein, Segal, and Spaeth, 2008).

in NOMINATE space. Because no such measurements currently exist, we use the ideology of the enacting state government as a proxy for the ideological position of the statutes themselves.

Our dependent variable is a dichotomous indicator of whether the Court formally invalidated any laws passed by a state in a particular enactment year/review year pairing.[4] In the context of our earlier example, in 1960 did the Court invalidate any laws passed by the state of Minnesota during 1960? To determine which laws the Court struck down during this period we relied on the list compiled by the Congressional Research Service (2001–2008). Dates of enactment (or the most recent date of reenactment or amendment) were determined by searching for statutory provisions in LexisNexis and Westlaw. We code 1 if the Court exercised judicial review, and 0 otherwise.[5]

A law was struck down in 305 of the 47,956 observations in our data set. On average, the Court invalidated 5.94 laws from each state with a standard variation of 5.94. While several states never had a law invalidated (Delaware, Idaho, Mississippi, South Dakota, and Wyoming), the Court has struck down 29 laws from the state of New York. Other frequently targeted states include Florida (19), Louisiana (17), Texas (17), and California (15). The year of enactment for invalidated laws is evenly distributed throughout the data set, except for a rapid decline after 1994. The year of invalidation for invalidated laws is also evenly distributed, though a few early years saw no invalidations (1960, 1962) and a few included unusually large numbers of invalidations (23 laws in 1972, 16 laws in 1977, 17 laws in 1982).

To code our independent variable of interest, *Enacting State-National Regime Distance*, we take several steps. First, to locate a state government in ideological space we use Berry et al.'s (1998, 2010) estimate of a state's ideology at the time of enactment. Second, to locate the national regime, we examine the Common Space scores of the president and the median member of both the House and Senate (Poole and Rosenthal, 1997).[6] Third, we calculate the absolute value of the distance between the state government and the nearest national actor. This

[4]When the Court formally invalidates a law from a specific state, it may be understood as de facto invalidating laws from others states. Our coding of the dependent variable does not account for these de facto invalidations. To evaluate the possibility that this factor has biased our results, we examined amicus briefs from LexisNexis (available 1980–2006) in cases where a state law was invalidated. For each of these cases, we treated the Court as effectively invalidating laws enacted in every state that filed an amicus brief in the year that the brief was filed; that is, we assume filing the brief is an indication the state government still supports the law. We reestimate our model using this revised dependent variable and find substantively similar results. We conclude that the exclusion of de facto invalidations does not bias our findings.

[5]Strictly speaking, our dependent variable is a count; however, only a handful of its nonzero values are greater than 1. Of our 47,956 observations, we observe only 16 instances where the Court struck down more than one law. To ensure the robustness of our results, we reestimated the model using a negative binomial regression model. Our substantive results are unchanged.

[6]Berry et al. (2010) base their measures of state government ideology on Common Space NOMINATE Scores; however, they rescale their measures to fit on a 0–100 scale. With the kind assistance of Richard Fording, we rescaled these values back to the Common Space scale. This allows us to directly compare them to the Judicial Common Space (Epstein et al., 2007b).

distance represents the policy gap between the status quo (i.e., the state law) and the equilibrium policy obtained in a simple legislative game where the national actors seek to supplant the state law with one that is more preferable to them. When the state law is contained within the legislative equilibrium range, we code our distance variable as zero. If the regime politics conjecture is accurate, then the Court should be more likely to strike down a state law when it is distant from the outcome that is preferred by the national regime. Thus, this variable should be positively signed and statistically significant.

The states fall into the legislative equilibrium range in 24,568 of our 49,956 observations. Roughly half the states fall outside the interval in any given year. Which states fall outside the range in a given year is primarily a function of the regime's ideology. For example, in 2004, when Republicans controlled Congress and George W. Bush was president, all of the states falling outside the interval were more liberal than the national regime, with the most liberal state governments registering the greatest distance from the regime (New Jersey, New Mexico, Rhode Island, Washington, and Massachusetts). In 1993, when the Democrats controlled Congress under President Clinton, most of the states outside the interval were more conservative than the national regime, with the most conservative state governments registering the most distance (New Hampshire, Arizona, Utah, and Michigan). However, a few liberal states also fell on the other side of the interval in this year (Maryland, Rhode Island, and Hawaii).

To control for the possibility that the Court is striking down a statute for its own policy-based reasons, we include *Enacting State-Court Median Distance*, which we measure as the absolute value of the difference between a state government's ideology and the median justice of the Court. If the Court behaves in an attitudinal manner, then the sign on this variable should be positive. This variable might also be interpreted as an alternate measure of the regime politics hypothesis. Rather than invalidating laws disfavored by the sitting government, the justices might strike down laws disfavored by the regime that appointed them to the Court, and their own ideology might simply act as a proxy for the ideology of the regime that appointed them.

Beyond these two variables of primary interest, we also include a variety of controls.[7] First, we control for the age of a statute. This follows the results of Harvey and Friedman (2006), who find a systematic relationship between the likelihood of invalidation and a statute's age. The Court is unlikely to invalidate a law immediately after its enactment due to the time necessary for the law to be implemented, challenged, and eventually reach the Supreme Court. On the other hand, the Court may be less likely to invalidate state laws that have been on the books for a long period of time because these

[7]We have also run alternative models in which we interact *Enacting State-National Regime Distance* and *Enacting State-Court Median Distance*. We fail to find any evidence that the Court tends to invalidate laws more frequently when both the Court and the national regime are ideologically distant from the enacting state.

laws might fall out of use or become entrenched as widely accepted legal traditions. Accordingly, we include both *Statute Age* and, to capture potential nonlinearities in the effect of time, *Statute Age Squared*.

Because our analysis uses aggregated data, we also control for the output of state legislatures, which we call *Number of Enacted Statutes* and code as the number of laws passed by a state in a particular year. We obtain these data from the yearly versions of *The Book of the States*. All else equal, the more legislation coming out of a state, the more likely it is by chance alone that the Court will strike down a law. In a similar vein, we also control for the output of the Court itself. *Number of Cases Decided* is coded as the number of cases granted review by the Court in a particular year. We obtain these data from Epstein et al. (2007c).[8] Our dependent variable—whether judicial review is exercised by the Court for a state statute year pairing—is dichotomous, so we estimate a logistic regression model and cluster our standard errors on the 1,933 unique combinations of each state and year of legislative enactment.[9]

Results

Parameter estimates for the model are reported in Table 1. Recall that the conjecture suggested by the regime politics literature predicted that as the ideological distance between an enacting state and the current regime increased, so too would the likelihood of the Court intervening to strike down legislation. That is, the theory predicts a positive coefficient on the variable. As the coefficient in the table makes clear, however, we find a *negative* relationship between ideological distance and the Court's propensity to exercise judicial review.

To shed additional light on this rather surprising result, we turn to Figure 1, which illustrates the effect of our distance variable. On the *x*-axis, we portray the entire range of ideological distance. The *y*-axis denotes the probability that the Court strikes down some piece of legislation enacted by a particular state in a particular year. Within the plot, the thick black line and shaded gray region provide a point estimate and two-tailed 95 percent confidence intervals, respectively. While the absolute probabilities are exceedingly small (i.e., at most, a one-fifth of a 1 percent chance), the general trend is unmistakable. Our data suggest that the Court is ultimately least likely to strike down

[8] Beyond these controls, there may be other indicators of how important a given state's laws might be and, as a result, how likely the Court is to invalidate them. To test this intuition, we estimated an auxiliary model that included a variable for the population of each state during the year of review. We find a positive and significant relationship effect but the inclusion of this control does not have a substantial impact on our main results.

[9] As these data are time series cross-sectional data, one potential concern deals with the lack of independence across observations. We address this by clustering our standard errors on each state-enacting year but have explored a variety of other fixed effects strategies. Under none of these alternative specifications do our results become consistent with the regime politics hypothesis (additional details available from the authors upon request).

TABLE 1

Logistic Regression Model of Whether the Supreme Court Exercises Judicial Review of a Law Passed by a State in a Specific Enactment Year

Variable	Coefficient	Robust SE
Enacting state-national regime distance	−1.174*	0.582
Enacting state-court median distance	−0.181	0.408
Statute age	−0.091*	0.032
Statute age squared	−0.003	0.002
Number of enacted statutes	0.001*	0.000
Number of cases decided	0.006*	0.001
Constant	−5.229*	0.212
Observations	47,956	
Log-likelihood	−1,585.084	
Pseudo-R^2	0.142	

NOTE: Parameter estimates are maximum likelihood and robust standard errors are clustered on 1,933 unique groupings of each state and enactment year combination (e.g., Minnesota-1960, Minnesota-1961, etc.).
*$p < 0.05$ (two-tailed test).

legislation when it originates from states that are ideologically distant from the existing national regime.[10] As the distance between an enacting state and the national regime runs from minimum to maximum, we find that the relative probability of the Court striking legislation drops by more than 50 percent.

As evidenced by Table 1, several of our control variables also achieve statistical significance. In Figure 2, we display the magnitude of their substantive effects. We find that younger statutes are more vulnerable to judicial review than are their older counterparts. A statute in its first year of age is roughly eight times more likely to be struck down than one that is of average age (approximately 15 years old).

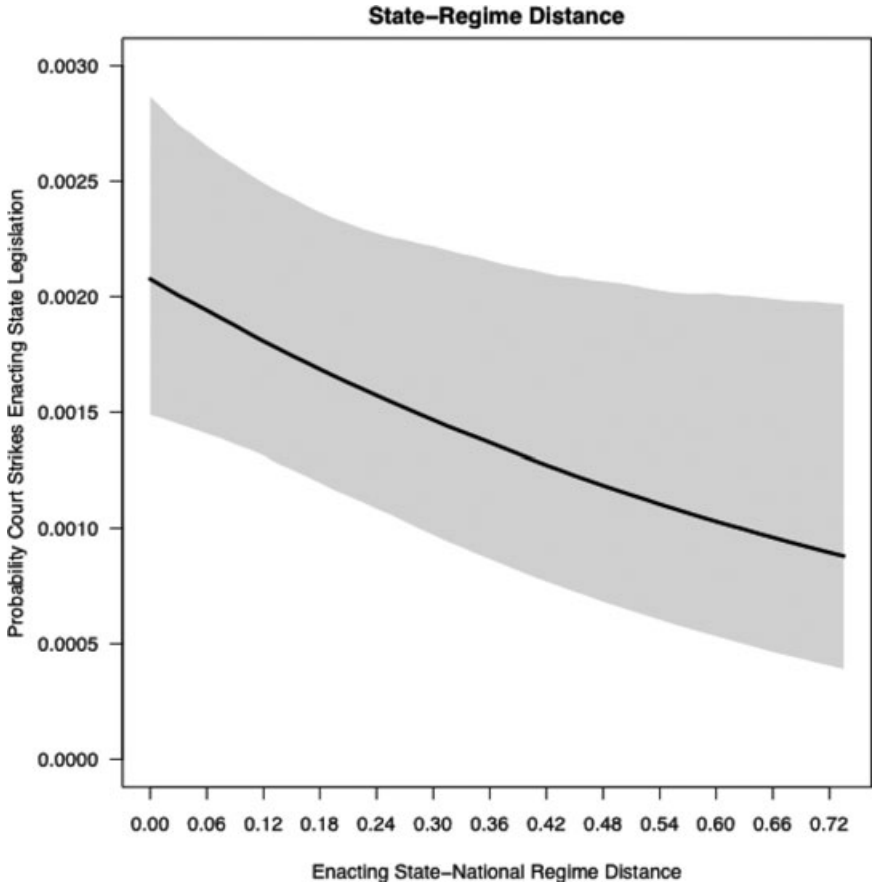
Unsurprisingly, we find that both legislative and judicial output systematically affect the Court's propensity to exercise judicial review. When a legislature has high output and enacts, for example, around 870 bills (one standard deviation above the sample mean), the Court is 2.2 times more likely to strike down one of its laws than when its output is low (i.e., the sample minimum—a single law). Similarly, the Court is nearly twice as likely to strike a state law when it hears a large number of cases in a year versus when it hears a small number.[11]

[10] It could be the case that the Court only acts on behalf of the national regime to strike legislation when the Court itself is ideologically proximate to the regime. This suggests that the distance between the Court and the national regime should condition our *Enacting State-National Regime Distance* variable. To investigate this account, we reestimated our model with this alternative specification. We fail to find support for the conditional story, as well.

[11] For this counterfactual we use a low value of 78 (the sample minimum) and a high value of 196 (one standard deviation above the sample mean).

FIGURE 1

Effect of Ideological Distance Between an Enacting State and the National Regime on Likelihood of a State Law Being Struck Down



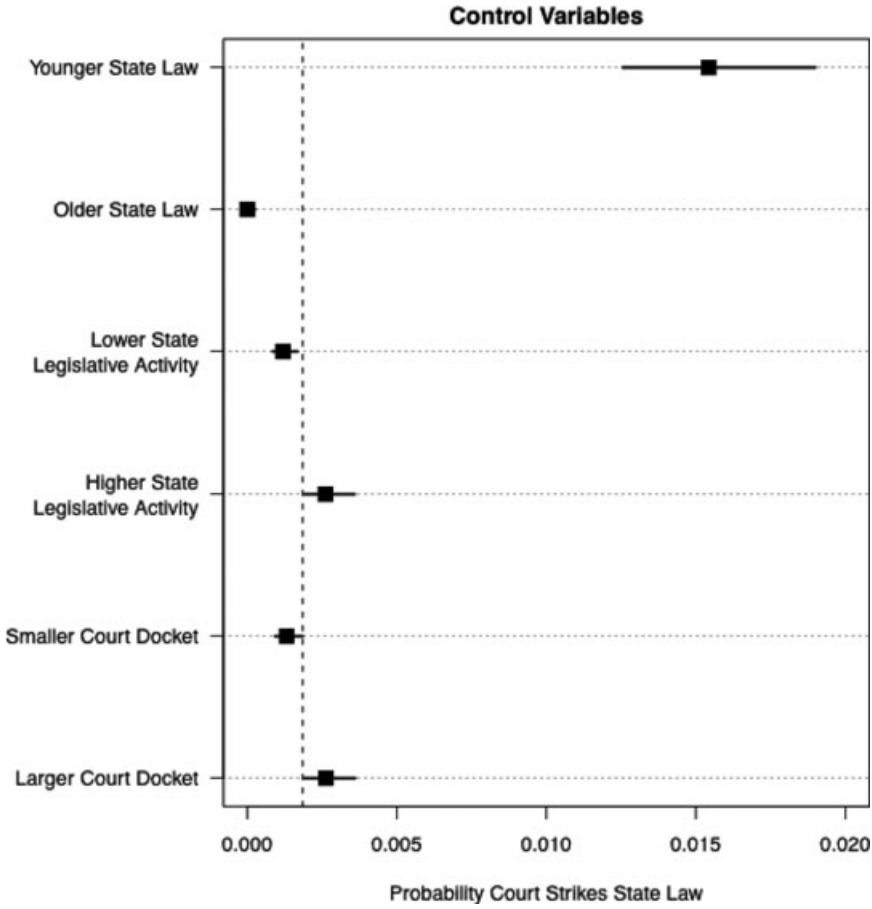
NOTE: The thick black line is the probability point estimate and the gray-shaded region around it denotes the two-tailed 95 percent confidence interval. All other variables were held at their sample means or modes, as appropriate. These values were generated through stochastic simulations.

Discussion

Many regime politics scholars claim the U.S. Supreme Court generally promotes the interests of the dominant governing coalition rather than acting as a countermajoritarian force in the American political system. According to these scholars, even the invalidation of state and federal laws—which might appear to thwart majority will—actually serves the regime's interests. Specifically, the Court may invalidate state laws in order to enforce a national consensus against

FIGURE 2

Effect of Additional Control Variables on Likelihood that an Enacting State's Legislation Is Struck Down



NOTE: The squares are the probability point estimates and the horizontal whiskers around them denote two-tailed 95 percent confidence intervals. All other variables were held at their sample means or modes, as appropriate. These values were generated through stochastic simulations.

outlier states. We find that the Court does not tend to use judicial review of state laws to enforce a national policy consensus against outlier states. If anything, the Court tends to target statutes enacted by states in the ideological mainstream.

At first blush, these findings appear very puzzling. Although we are hesitant to engage in too much post hoc theorizing, we note that our findings are not inconsistent with an alternative approach to the study of judicial

behavior. The Court's tendency to invalidate laws enacted by state governments that are ideologically proximate to the national regime may be consistent with a strategic account of judicial behavior by genuinely independent justices. There are several reasons to suspect the Court may behave in this manner.

First, consider the claim that "a major goal of all justices is to see the law reflect their preferred policy positions," and the justices pursue their policy goals when selecting which cases to hear (Epstein and Knight, 1998:11, 26). "Given a finite number of cases that can be reviewed in a single term, the Court must decide how to utilize its time, the Court's most scare resource" (Segal and Spaeth, 2002:191). In other words, justices must carefully select those cases that will optimally advance their own policy goals (as opposed to those of the regime).[12] It is unlikely that challenges to laws adopted in only a few outlier states would frequently serve as appropriate vehicles for the Court to alter policy. Instead, the justices may focus on laws common to numerous states (including mainstream states) and rely on the lower federal courts to invalidate unusual laws in outlier states. Accordingly, the justices may target laws from mainstream states in order to maximize their effect on policy throughout the nation.

Second, even if justices do not act strategically in this manner, there is good reason to believe that litigants may. If organized interests hope to maximize their effect on policy through litigation, they also may tend to target laws from mainstream states because these laws tend to be common to many different states. Additionally, litigants may systematically target laws in mainstream states rather than outlier states for strategic reasons. For example, if the same conservative policy was adopted in an extremely conservative state and a more moderate state, organized interest groups might deliberately challenge the law in the moderate state, predicting a greater chance of success in the lower courts. This conjecture is consistent with studies that document similar strategically minded behavior on the part of interest groups (e.g., Hansford, 2004a, 2004b).

Finally, laws enacted by mainstream states may tend to be common to a large number of states across the country. As a result, the odds of these statutes being interpreted in multiple circuits, and thus the possibility of intercircuit conflict, may be greater for these statutes than those laws that exist in only a few outlier states.

Unfortunately, limitations in our data prevent us from directly testing this alternative theory, so we leave the task to future scholarship. Nonetheless, our findings pose a serious challenge to a critical component of the regime politics approach. Most of these scholars have focused their attention on invalidations

[12]The failure of our model to show a relationship between the Court's ideology and the ideology of the enacting state would tend to discount the possibility that the Court attempts to maximize its *ideological* policy preferences, but it does not discount the possibility of the Court trying to maximize the policy impact of its rulings that are issued on nonideological grounds.

of federal laws and the more obvious countermajoritarian difficulties raised by such invalidations; however, judicial review of state laws cannot be easily dismissed as an institutional mechanism used to overcome problems of federalism. Instead, both normative and empirical scholars should carefully consider the possibility that the Court systematically undermines the interests of the dominant regime through the invalidation of state law. If so, the Court may wield greater independence and judicial review may pose a more serious democratic concern than previously thought.

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